(6)

No. 05-970

IN THE
Supreme Court of the United States

JAMES M. BANNER, JR., *ET AL.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *ET AL.*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

WALTER SMITH
DC Appleseed Center for Law and Justice
1111 14th St. NW, Suite 510
Washington, DC 20005
202-289-8007

Counsel for Petitioners District of Columbia, Mayor Anthony Williams, District Council, and Individual Council Members

JOHN W. NIELDS, JR.
Counsel of Record
JOHN F. STANTON
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Ave. NW
Washington, DC 20015
202-772-2291

CAROLYN LAMM
White & Case, LLP
701 13th St. NW
Washington, DC 20005
202-626-3605

Counsel for Individual Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Petitioners respectfully submit this Reply to the Opposition Briefs submitted by the Federal Respondents and by the States of Maryland and Virginia.

A. THE EQUAL PROTECTION/DUE PROCESS CLAIM

1. The Federal Respondents argue that District residents are not "similarly situated" to non-residents when it comes to *local* income taxes; and that a claim under the equal protection component of the Due Process Clause must therefore fail at the threshold. *See* Fed. Opp. at 5.

This argument is contradicted by numerous prior decisions of this Court. This Court has struck down on equal protection grounds numerous *local* tax laws simply because they treated residents and non-residents unequally. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 572 (1949); *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 118-19 (1968); *Metro Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Williams* v. *Vermont*, 472 U.S. 14 (1985). Indeed, in *Wheeling Steel Corp.* v. *Glander*, *supra*, the Court struck down a tax that treated residents and non-residents unequally, stating explicitly that "the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of *the difference in residence*." *Id.* at 572 (emphasis added).

Under this Court's decisions, residents and non-residents are "similarly situated" for equal protection purposes when they engage in identical taxable transactions within the taxing jurisdiction.

2. Next, the Federal Respondents argue that it is the structure of the *Constitution* that results in the

discrimination, and that Petitioners are therefore quarreling with the Constitution itself. *See* Fed. Opp. at 5. This is utter nonsense. The *Constitution* gives Congress the *power* to tax *both* residents and non-residents on the income they earn in the District.[1] It is *Congress* that decided to exempt non-residents and to tax only District residents. It is *Congress* that decided to shift tax burdens away from its voting constituents and place those tax burdens on the backs of non-voting District residents. And it is *Congress* that created an income tax scheme under which District residents pay the highest state and local taxes in the country. The Constitution did none of these things.

3. Congress undoubtedly decided to shift tax burdens away from its voting constituents and onto District residents because the members of Congress pay no political price for doing so: District residents do not vote. Thus, as this Court explained in *McCulloch* v. *Maryland*, 17 U.S. 316, 428 (1989) (Marshall, C.J.), "the only security against the abuse of [the taxation] power ... is the influence of the constituents over their representative" through the power to vote. Non-voters are normally given effective protection against abusive taxation through the requirement that they be treated *the same* as voters. That was this Court's point in *Loughborough* v. *Blake*, 18 U.S. 317, 325 (1820) (Marshall,

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[1] State legislatures have the power to impose their income taxes on both residents and non-residents who earn income within their borders. *See Shaffer* v. *Carter*, 252 U.S. 37 (1920). And the same power is plainly possessed by the United States Congress under the District Clause. *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886) (Congress may impose taxes under its District Clause powers" in like manner as the legislature of a state").

C.J.) (federal tax on the District upheld because "the principle of *uniformity* . . . secures the District from oppression in the imposition of indirect taxes") (emphasis added).

Where, however, Congress treats non-voters differently from voters, the non-voters lose their protection from unfair taxation. That is what has happened here. And that is why scrutiny is appropriate. This is the fundamental point made in our Petition. None of the Respondents answer this point anywhere in their briefs.[2]

B. THE UNIFORMITY CLAUSE CLAIM

1. Contrary to the contention by the Federal Respondents (Fed. Opp. at 6), the Uniformity Clause applies squarely to the District. *Loughborough* v. *Blake*, 18 U.S. 317, 319 (1820) ("The District of Columbia . . . is not less within the United States, than Maryland or Pennsylvania" for uniformity clause purposes).

The Uniformity Clause was placed in the Constitution to prevent the possibility that Congress might impose "unequal tax burdens." It was placed in the Constitution to prevent the possibility that Congress would "relieve its constituents at the expense of other people." *See*

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[2] The Commonwealth of Virginia argues that Petitioners lack standing. This claim was correctly rejected by the Court of Appeals. *See* Petn at App. 6a n.28. A member of a disfavored class always has *standing* to raise an equal protection clause claim. *Id.*; *Orr* v. *Orr*, 440 U.S. 268, 273 (1979).

Petn at 25. That of course is just what Congress has done here.

2. The Federal Respondents argue that the Uniformity Clause has little or no application to *local* taxation. However, *Binns* v. *United States*, 194 U.S. 486 (1904), establishes that the Uniformity Clause applies to a *local* tax law where the local tax law Congress has enacted is one designed "for the benefit of the nation, as distinguished from [one] necessary for the support of the [local] government." And that is precisely what has been alleged here. Thus, the Complaint alleges at ¶ 7 that "the Prohibition takes over $30 billion in taxable income that would be taxable by the District under the universal 'income-source' rule, and gives it instead to Virginia, Maryland and other states to tax." App. 69a. The Prohibition harms the District, and is plainly designed for the benefit of other parts of the nation.

None of the Respondents answers this point.

* * * * *

Departing from the universal principle of income taxation, Congress has discriminated between residents and non-residents in the taxation of income earned in the District. Congress has decided to give its voting constituents a tax break, and to exempt them from contributing their fair share of the costs they impose on the District where they work. As a result, non-voting District residents pay the highest state and local taxes in the nation.

Given our country's history and its Constitutional jurisprudence, this burdensome and discriminatory treatment of a class of people who lack the right to vote raises serious and important issues. Moreover, the Prohibition jeopardizes the ongoing financial health of the Nation's Capital. This point is made in, and underscored by, the *amicus* brief submitted in support of the petition by the District of Columbia Chamber of Commerce, the Federal City Council, the Federation of Citizen Associations of the District of Columbia, the Washington D.C. Federation of Civic Associations, the District of Columbia Affairs Section of the District of Columbia Bar and many former Presidents of the D.C. Bar. None of the Respondents disputes this at all.

We respectfully request that the petition be granted.

Respectfully submitted,

JOHN W. NIELDS, JR.
Counsel of Record
JOHN F. STANTON
Howrey, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Avenue
Washington, D.C. 20005
(202) 772-2291

CAROLYN LAMM
White & Case, LLP
701 Thirteenth St. N.W.
Suite 600 South
Washington, D.C. 20005
(202) 626-3605

Counsel for Individual Petitioners

WALTER SMITH
D.C. APPLESEED CENTER FOR LAW AND JUSTICE
733 Fifteenth St., N.W., Suite 300
Washington, DC 20005
(202) 393-1158

Counsel for Petitioners District of Columbia, Mayor Anthony Williams, District Council, and Individual Council Members

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